Paramount Farms, Inc. *and* Packing & Food Processing Employees Union, Local Union 550, Laborers' International Union of North America, AFL–CIO. Cases 31–CA–24079, 31–CA–24097, and 31–CA–24102

July 30, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On July 31, 2000, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Paramount Farms, Inc., Lost Hills, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Brian D. Gee, Esq., for the General Counsel.

Mark Theodore, Esq. and *Michael McClelland, Esq. (Jackson, Lewis, Schnitzler & Krupman),* for the Respondent.

Mario Hernandez, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in Los Angeles, California, on May 1 and 2, 2000. Packing and Food Processing Employees Union, Local Union 550, Laborers' International Union of North America filed the charges in Cases 31–CA–24079, 31–CA–24097, and 31–CA–24102 on August 23, 1999, September 7, 1999, and September 9, 1999, respectively.1 An order consolidating cases, consolidated complaint and notice of hearing issued on January 26, 2000, alleging inter alia, that Paramount Farms, Inc., the Respondent, violated Section 8(a)(1) and (3) of the Act by discharging employees Margarita Arviso and Leticia Ortiz on March 15, 1999, and April 29, 1999, respectively.2 The complaint further alleged that the Respondent violated Section 8(a)(1) of the Act in about March by informing employees that Respondent would assist them if they wanted to get their authorization cards back from the Union.3 The Respondent filed an answer to the complaint on February 8, 2000, denying that it committed the alleged unfair labor practices and raising several affirmative defenses.

At the hearing, the General Counsel amended the complaint to allege that the Respondent also violated Section 8(a)(1) of the Act, on three separate occasions in March, by telling its employees that Arviso had been discharged because of her union activities. The Respondent opposed this amendment on statutory and constitutional grounds. The Respondent argues that the new allegation is untimely under Section 10(b) of the Act, and that the General Counsel denied it due process by waiting until the end of his case to add the new allegation to the complaint. The Board has allowed the General Counsel to amend a complaint at the hearing to add allegations that would otherwise be barred by Section 10(b) of the Act where the new allegation is "closely related" to the allegations of a timely filed charge. *Redd-I, Inc.,* 290 NLRB 1115 (1988). Accord: *Dico Tire, Inc.,* 330 NLRB 1252

, fn. 2 (2000); *Fiber Products,* 314 NLRB 1169 (1994), enfd. sub nom. *FPC Holdings, Inc. v. NLRB,* 64 F.3d 935, 940–942 (4th Cir. 1995). In *Redd-I,* supra, the Board identified three factors that it would consider in determining whether the new allegation that the General Counsel seeks to add is "closely related" to the allegations of a timely filed charge: (1) whether the new allegations involve the same legal theory as allegations in the timely filed charge; (2) whether they arise from the same factual circumstances; and (3) whether the Respondent would raise the same or similar defenses.

I find that the amended allegation here meets the "closely related" test. The new allegation involves the same legal theory as the complaint's allegation that Arviso was discharged because of her union activity. To prove that allegation, the General Counsel must show that Arviso's union activity was a motivating factor in her discharge. See *Wright Line,* 251 NLRB 1083, 1089–1090 (1980), enfd. 622 F.2d 899 (1st Cir. 1980), cert. denied 455 U.S. 988 (1982). A statement by one of the Respondent's supervisors that Arviso was fired because of her union activity, if found credible, would tend to establish the unlawful motivation. The fact that the statement is alleged as a violation of Section 8(a)(1) while the discharge is alleged as a violation of Section 8(a)(3) does not mean that the two allegations involve different legal theories. As the court of appeals noted in enforcing the Board's order in *Fiber Products,* supra, allegations need not arise under the same statutory section to involve similar legal theories. It is enough that both sets of allegations are part of the same effort or crusade against protected concerted activity. 64 F.3d at 941. The new allegation, that Arviso's supervisor made statements about her termination within days of the termination, clearly arises from the same factual circumstances since both the timely allegation and the new allegation arise out of the circumstances of Arviso's termination. Finally, the Respondent is likely to raise the same or similar defenses to both allegations, i.e., that Arviso's union activity had nothing to do with her termination making it unlikely that her supervisor would have made such statements. Accordingly, I find that the General Counsel's amendment of the complaint was not barred by Section 10(b) of the Act.

The Respondent's due-process argument raises a different issue, i.e., whether the Respondent had sufficient notice and an opportunity to defend itself against the government's attempts to impose liability on the Respondent for the actions of its supervisors. See *Parsippany Hotel*

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge's finding, for the reasons set forth in his decision, that the amended 8(a)(1) allegations are closely related to the allegations in the timely filed charge. We also find no merit to the Respondent's contention that it was denied due process by the judge's acceptance of the amended allegations. While the judge gave the Respondent an opportunity to request time to prepare a response to the new allegations, the Respondent does not dispute the judge's statement that the it never requested additional time.

[1] The charges in Cases 31–CA–24079 and 31–CA–24097 were each amended on November 30, 1999.

[2] All dates are in 1999 unless otherwise indicated.

[3] At the hearing, the General Counsel withdrew an allegation that the Respondent, through Supervisor Augustin Arias, violated Sec. 8(a)(1) of the Act by interrogating an employee on March 30.

Management Co. v. NLRB, 99 F.3d 413, 419 (D.C. Cir. 1996). When the General Counsel amended the complaint at the conclusion of its case, I offered Respondent's counsel additional time to respond to the new allegation if he believed additional time was necessary. The Respondent never requested additional time and in fact offered evidence in response to the new allegation. Under these circumstances, it cannot be said that the Respondent was denied due process.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, processes almonds and pistachios and manufactures fruit rolls at its facility in Lost Hills, California, where it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of California. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent has a 140-acre facility in Lost Hills, California where it maintains separate operations for each of its product lines, i.e., pistachios, almonds, and fruit rolls. Each operation has its own plant manager and supervisory hierarchy. At the time of the hearing, the Respondent employed approximately 600–700 employees in all three operations. David Szeflin, the Respondent's vice president of operations, who is responsible for the entire facility, testified that the number of employees varies constantly because of the seasonal nature of the business. The allegations at issue here all involved employees in the pistachio processing operation. At all relevant times, David Blanchat was the director of pistachio operations, Donald Dodd was the pistachio production manager, and Juan Ramirez was a supervisor in the pistachio department. The Respondent admits that all three are statutory supervisors and agents of the Respondent.

The pistachio season generally begins with the harvest in August and September, when the Respondent receives all of its crop for the year. The Respondent processes about 60 percent of the California pistachio crop. During the harvest, the Respondent's employees process the nuts by removing the hull and drying and stabilizing the nuts for storage in its silos. Throughout the year, pistachios are removed from the silo and processed further into the final product which is shipped to its customers. The busiest months and peak employment period, are generally from October through December.

The evidence indicates that the Union began its organizing drive among the Respondent's employees sometime in late 1998. Arviso testified that she first learned about the Union from another employee in December 1998 and signed a card at the first meeting she attended on December 20, 1998. Szeflin testified that the Respondent became aware of the Union's organizing drive in early 1999 through reports that the Union was collecting authorization cards. According to Szeflin, the Respondent reacted to this news by conducting training sessions with its supervisors and managers about unions and the law in January and February. The evidence indicates that the Respondent also held meetings with its employees and distributed written material during the Union's campaign. Although the Union collected cards through most of 1999, it did not file a petition until August 18. There is no dispute that an election was conducted at an undisclosed date after the petition was filed and that the Union lost by a wide margin. The Union did not file any objections to that election.

A. The Allegedly Unlawful Assistance to Employees in Revoking Authorization Cards

There is no dispute that, sometime around March, Szeflin held a series of meetings with all the employees at which he talked about the Union, and union authorization cards in particular. Szeflin testified that he decided to hold such meetings because of reports he was receiving from his supervisors indicating that employees were confused and didn't understand the significance of signing a card. In preparation for his meetings, Szeflin used a text prepared by the Respondent's attorneys and crafted his own script. Although Szeflin at first testified that he shortened and "paraphrased" the attorney's text, he later claimed that he merely lifted portions of that text verbatim to come up with a shorter version that he could deliver to a large number of employees at several meetings over the course of a single day. He testified further that, in preparing his script, he did not alter the message in the attorney's text. The text prepared by the attorney was put in evidence by the Respondent, but Szeflin conceded that he could not recall which sentences or phrases from that text he used in his script. Szeflin testified further that he no longer had the script that he actually used in his meetings with the employees.

At each meeting, Szeflin first read from his script, which lasted about 10 minutes, with Juana Lacy, the Respondent's vice president of human resources, translating into Spanish. Lacy testified that she also used notes which no longer existed at the time of the hearing. After the prepared text was read and translated, Szeflin opened each meeting to questions from the employees. The length of each meeting varied depending on the number of questions. Szeflin, who does not speak Spanish, testified that there were times when Lacy answered a question in Spanish without translating it for him and without waiting for an answer from him to translate back to the employees. Lacy testified, in contrast, that she translated each and every question for Szeflin and only translated answers provided by Szeflin. She denied ever answering independently of Szeflin. Szeflin testified that when questions were asked that were not covered by the prepared text, he answered them based on his own knowledge. Lacy testified, in contrast, that the only questions that were answered were those for which answers could be found in the prepared text. According to Lacy, if an employee asked a question that went beyond the scope of the text, she would either tell the employee to ask the Union that question or would say that she would get the information for the employee later.

The General Counsel called three witnesses to testify about these meetings conducted by Szeflin and Lacy. Lupe Cota, a current employee of the Respondent in the pistachio department, testified that she attended a company meeting in the conference room next to the dining room at which union authorization cards were discussed. She could not recall the date of the meeting but remembered that it was in the morning. She recalled that about 30 people attended this meeting, including Supervisor Gustavo Enriquez and Juana Lacy. According to Cota, a man whose name she could not recall spoke in English and Lacy translated into Spanish. She testified that Lacy told the employees, in Spanish, that she was going to give the employees a letter so they could get back the cards they signed for the Union. Cota testified further that Lacy then handed out a letter and told the employees to sign it and bring it to the office to be sent to the Union so they could get their cards back. Because Cota does not understand English, she did not know what the man said and could not say whether Lacy translated his statements accurately. The letter Cota identified as having been distributed at this meeting is in English and Spanish and reads as follows:

AN IMPORTANT NOTICE TO ALL INTERESTED EMPLOYEES

We have been sharing a lot of facts with you, along with our strong feelings, about keeping a union out of our facility.

Some of you may have signed up before you realized all the risks, costs and obligations involved—you may wonder whether it is possible to change your mind. Some of you have asked about how you would get your signed cards back.

The good news is that you may be able to revoke your signature on the union card. *Whether you do anything or not is strictly up to you.* If you did sign up, but now think it was a mistake, you may do the following:

- Write a simple letter to the union (such as the one below).
- It would be a good idea to keep a copy of the letter you send as proof (You can never be sure if the union will have the courtesy to respect your right to change your mind).
- You might want to deliver the letter to the Laborers office to be sure it is received.

Sample Letter

Date:_____

Laborers Local 550
8607 S. De La Cruz
Parlier, CA 93648

To Whom It May Concern:

I am an employee of Paramount Farms, Inc. I want to cancel and revoke the card I signed authorizing the union to represent me. Please return the card to me immediately.

Signed,

Although Cota could not recall precisely when she received this letter, she was certain that it was in 1999 and not close in time to the election.

David Acevedo, another current employee of the Respondent in the pistachio department, testified that he attended a meeting in March similar to the one described by Cota. He testified that the Respondent held such meetings either in the room where employees ate or in the conference room. He did not specify the location of this particular meeting. He recalled that about 35 people were at the meeting he attended, including Supervisors Enriquez and Juan Ramirez and that the meeting was in the morning. According to Acevedo, Lacy conducted the meeting, but Szeflin did the talking. Acevedo testified that Lacy told the employees to sign the paper she was handing out and to take it to the office because "then they were going to return our cards to us and there would be no reprisals." Acevedo identified the same letter that Cota had identified as the one that was distributed at this meeting, except that he recalled it was on green paper. On cross-examination, Acevedo acknowledged that he recalled nothing else that was said during this meeting, which he described as lasting 30 to 45 minutes. He recalled that the meeting started with a 5–10 minute speech about union cards and that the rest of the meeting was employees asking questions and Lacy responding. Although he could not remember any specific questions, he recalled that employees wanted to know if anything would happen to them if they signed the card. He explained that he was able to remember what Lacy said about the letter because that was the most important part of the meeting.

Leticia Ortiz, one of the discriminatees, testified that she attended a meeting on April 5 at which Szeflin spoke and Lacy translated. Because Ortiz worked on second shift, the meeting she attended was in the afternoon, at about 5:30. She recalled that about 15 employees and their supervisors were present. According to Ortiz, the meeting was about union cards and other things. Ortiz testified that the employees were told that if anyone had signed a card, they could ask for them back. She recalled being told "not to be fearful, because they were there to help us, they were like a family, we don't need a union with the company." Although she was not certain, she believed that Szeflin read from a paper. She could not recall if Lacy also read from a paper. She remembered that Lacy sometimes spoke when Szeflin did not, in particular, when answering questions from the employees in Spanish. Ortiz did not testify that any papers were handed out at her meeting.

Both Szeflin and Lacy specifically denied making the statements attributed to them by the General Counsel's witnesses. As noted above, Szeflin testified that he read from a script based on a text prepared by the Respondent's attorneys. The prepared text deals primarily with union authorization cards and includes the sentence, "If you already signed a card, it is not too late. If you want to, you can get it back." There is nothing in the text prepared by the attorney regarding the procedure for getting the cards back, or any assistance available from the Respondent. Szeflin acknowledged telling employees they could get their cards back from the Union. Lacy, on the other hand, denied saying anything about employees getting their cards back, "because it wasn't in the script and we stayed to the script and that was something we spoke, not spoke to them about, but distributed information on later." Both Szeflin and Lacy testified that the letter identified by the General Counsel's witnesses was not prepared and distributed to employees until August, about a week before the petition was filed. They testified that this letter was prepared in response to continued questions from employees about how to get their cards back. Szeflin and Lacy testified further that the letters were not distributed at general employee meetings. Instead, they were distributed through the Respondent's supervisors at smaller "tailgate" meetings after the supervisors were given written instructions regarding what not to say about these letters. The written instructions, which are in evidence, advise the supervisors that they are not to tell employees that they should revoke their union authorization cards, that they should not follow up by asking employees whether they revoked their cards, that they should not let employees use the Respondent's stationary, copier, stamps or postage meter to revoke their cards, nor ask for a copy of the employee's revocation letter, nor call any employee into an office to discuss the matter.

In assessing the relative credibility of the witnesses, I have considered a number of factors, including their demeanor, the extent to which their testimony is consistent with that of other witnesses and evidence in the case, the reasonable probability that events occurred as described and the stake, if any, the witnesses had in the outcome of these proceedings. In addition, I have considered the fact that two of the General Counsel's witnesses were testifying adversely to their current employer. The Board has frequently found that such witnesses are inherently credible. See, e.g., *Flexsteel Industries,* 316 NLRB 745 (1995); *Georgia Rug Mill,* 131 NLRB 1304, 1305 fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962). I found Cota and Acevedo to be generally credible witnesses. In contrast, as noted above, Lacy and Szeflin contradicted each other on several aspects of the meetings. In addition, I find it suspect that neither Szeflin nor Lacy saved the script or notes they actually used at the meetings. The only document that the Respondent's witnesses apparently considered important enough to save was the antiseptic text prepared by the attorney. Because Szeflin admitted that he did not read from this text, it is not helpful in determining what was actually said at the meetings.

Nevertheless, despite my concerns about the credibility of the Respondent's witnesses, I am unable to find, as alleged in the complaint, that the Respondent, in *March*, "informed employees that [it] would assist them if they wanted to get their union authorization cards back from the Union." I note initially that Cota was unable to recall with any specificity when the meeting occurred. Ortiz, who attended a different meeting than Cota and Acevedo at about the same time, did not describe receiving any documents during the meeting she attended. Nor did Ortiz testify that Szeflin or Lacy encouraged or offered any unlawful assistance to employees in getting their cards back. On the contrary, Ortiz tended to corroborate Szeflin's testimony that all he told the employees was that it was not too late to get their cards back, that they could ask for them back. I also note that the document identified by Cota and Acevedo as having been distributed at the meeting or meetings they attended, opens with a sentence indicating it is the latest in a series of written communications from the Respondent to its employees. This suggests that the document was distributed later in the campaign than March. Based on the above, I find that Cota and Acevedo confused two events, i.e., the March series of meetings at which Szeflin and Lacy first talked to the employees about union authorization cards, and the August distribution of the sample letter employees could use to retrieve such cards from the union. While I have no doubt that someone told Acevedo and Cota to sign the letter and return it to the office so that the Respondent could forward it to the Union, I find it more likely that this occurred in August.

The Board has held that "an employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." *R. L. White Co.,* 262 NLRB 575, 576 (1982). Based on Ortiz' testimony, I find that the Respondent, at the March meetings conducted by Szeflin and Lacy, did no more than tell its employees that they had a right to get their signed union authorization cards back. In August, the Respondent went further when it admittedly distributed the sample letters and instructed its supervisors regarding what to tell the employees about getting their cards back. On its face, the letter distributed to the employees is lawful, a point conceded by the General Counsel. If Cota and Acevedo were in fact told to sign the letters and return them to the office so that the Respondent could mail them to the Union, then the Respondent would have crossed the line and violated the Act. See *Adair Standish Corp.,* 290 NLRB 317 (1988), enfd. 912 F.2d 854 (6th Cir. 1990). However, because I found that Cota and Acevedo had confused two events, I cannot find with any degree of certainty that it was Szeflin or Lacy who made these statements. It might well have been a front line supervisor who made these statements at one of the Respondent's tailgate meetings. Because of this

uncertainty regarding the agent responsible for the Respondent's unlawful conduct, I cannot find that the General Counsel has met his burden of proof as to this allegation. Accordingly, I shall recommend dismissal of this allegation of the complaint.

B. The Termination of Arviso

Arviso was employed by the Respondent from September 16, 1993, until her termination in March. She started as a handsorter and progressed to quality control in the pistachio department. At the time of her termination, she worked on first shift under Supervisor Juan Ramirez and Lead Person Maria Ponce nee Maria Ramirez.4 There is no dispute that Arviso was a satisfactory employee with only one incident of prior discipline, a 1998 verbal warning which Ramirez, her supervisor, did not even recall.

As noted above, Arviso got involved with the Union in December 1998 when she signed a union authorization card. She testified that, beginning on January 3, she held union meetings at her home, on a weekly basis, attended on average by about 30 employees. She also collected signed union authorization cards from 14 employees prior to her termination. In January, Arviso told Ponce, her leadperson, that she was holding union meetings at her house. According to Arviso, Ponce told Arviso that was no good, and advised her to get away from the Union.5 Arviso also testified about a conversation she had with her supervisor, Juan Ramirez, in February. According to Arviso, she was in the computer room next to the quality control department and called Ramirez over to fix a computer. After he was done, he asked Arviso what she knew about the Union. Arviso told Ramirez that she didn't know who or what he was talking about. Ramirez then told her to get out of the Union because there would be consequences for her if she didn't. There were no witnesses to this conversation.6

Arviso testified that her last day of work was February 18. Before leaving work that day, she met with Ramirez in his office and told him that she had received a call that her mother in Mexico was sick. Arviso told Ramirez that she might need to go to Mexico and asked "permission for three weeks." According to Arviso, Ramirez told her she would have to take her 1-week vacation and the remaining 2 weeks would be without pay. She told Ramirez that she was just asking for permission in case her mother's condition worsened, that she was not sure she would need to take it. Ramirez told her that, if she had to leave, even if it was in the middle of the night, to call his number at work and leave a message. Arviso was not asked to sign any leave request before she left work.

On Saturday, February 20, Arviso received a call from Mexico concerning her mother. She then called Ramirez' office number, as instructed, and left a message for him. In the message, she identified herself and said that she was going to Mexico because of her mother's bad health. Arviso also called Ponce, because she was her leadperson, so that Ponce could find a replacement for her for the following Monday. Arviso told Ponce the same thing she had said in her message for Ramirez. She also told Ponce that she already had Juan Ramirez' permission. Ponce told her it was okay and that she would let Juan know. Ponce wished her a good trip and good luck with her mother. In response to a leading question from General Counsel, Arviso added that she told Ponce that Ramirez had given her permission for 3 weeks.

Arviso testified that she left her mother's house in Mexico to return home on March 10 and that she arrived at her home in California on March 13, a Saturday. When she called her daughter, who also works for the Respondent, to let her know that she was home, her daughter reported that a lady who works with Arviso said that Arviso had been fired. Her daughter told Arviso that the lady said the reason was that she had exceeded her 2 week's leave. Upon hearing this, Arviso called Ponce to tell her that she was back. Ponce yelled, "what have you done," and told Arviso that she would have to go to the personnel office before coming back to work. When Arviso asked why, what was happening, Ponce said she knew nothing, "just go to personnel."

On Monday, March 15, Arviso did as she was instructed by Ponce. She arrived at the personnel office at her normal starting time, 6 a.m., and waited until 8 a.m. for the office to open. Juan Ramirez and Ponce went into an office and, after about 10 minutes, Ponce came out and walked past Arviso without saying anything. Ramirez then called her into the office where she met with Ramirez and Donald Dodd, the plant's production manager. They sat her down in front of a speakerphone. A woman named Guadeloupe was on the phone. Ramirez asked Arviso, in Spanish, if she knew what was happening. Arviso said she did not. Ramirez told her to "listen to what they're going to tell you over the phone." Guadaloupe then told Arviso that she was terminated because she was supposed to return to work on March 8. Arviso asked why, because she had 3 week's leave which didn't end until that day. She said she had permission from Juan Ramirez. Guadeloupe told her that the leave was only for 3 weeks, that she was fired, and that she should turn in her identification. Guadeloupe told her that she would get her check in the mail. When Arviso again asked why she was fired because she had left on an emergency and had permission, Guadeloupe said she did not know, she only knew that Arviso was fired. Arviso testified that, as far as she knew, no one asked any questions of Ramirez during this meeting. However, she recalled that Guadaloupe did speak to Ramirez in English. Arviso did not understand what they said.

Arviso testified that she had a note from her mother's doctor in Mexico that she brought with her to the meeting as proof that she was needed to care for her mother. According to Arviso, she had the letter folded in her lap and did not give it to anyone during the meeting. The letter, which is in evidence and was translated from Spanish by the court interpreter, is dated March 19. When this discrepancy was pointed out to Arviso, she testified that the doctor wrote the date wrong.

Arviso testified that, after this meeting, she received a termination letter in the mail with her checks. The letter, signed by Lacy, is dated March 10. The letter states that Arviso's leave only extended through March 8 and that she had failed to report her absences and failed to return to work since that date. The letter stated further that Arviso's actions were considered a voluntary quit.

Arviso filed a complaint with the California Department of Fair Employment and Housing (DFEH) on April 20, alleging sex discrimination, sexual harassment, and retaliation for complaining about sexual harassment. The individual she accused of sexual harassment was Antonio Mendez. The complaint form signed by Arviso is in English and makes no mention of her union activity. Arviso testified that she spoke to someone at the DFEH on the phone and they sent her the form to sign. The unfair labor practice charge alleging that she was terminated because of union activity was not filed by the Union until almost 6 months after her termination. At the hearing, in response to a leading question from the Respondent's counsel, Arviso testified that she believes the only reason she was fired was her union activity.

Cota testified that, about 2 days after Arviso was fired, while working at the quality control table, some employees asked Ramirez what happened to Arviso. Ramirez responded that they had dismissed her on account of the Union. According to Cota, Ramirez said nothing further and left the area. Cota testified further that, around the same time, during the lunch break, people were again asking Ramirez why they had fired Arviso. According to Cota, Ramirez gave the same response as before. Again, he said nothing further on the subject.

Acevedo testified that, about 2–3 days after Arviso was fired, he encountered Ramirez having a conversation with Antonio Mendez in the hallway from the work area to the conference room. Acevedo heard Mendez ask Ramirez if Arviso was going to come back. Ramirez said "[N]o, because of the union matter, she is not going to come back." According to Acevedo, Ramirez and Mendez stopped talking when they noticed Acevedo was there.

Ramirez testified that Arviso met with him and Ponce in his office in early to mid-February to request leave to visit her sick mother in Mexico. According to Ramirez, Arviso asked if he could give her vacation because she might have to leave on an emergency. Arviso also asked if he could giver her one more week, beyond her vacation. Ramirez told her that the vacation would not be a problem, but that he would have to check with human resources about the leave and get back to her. It was Ramirez' understanding that Arviso wanted to take all of her vacation time and enough leave to make 2 weeks. Ramirez testified that Arviso told him that

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[4] Maria Ramirez is no relation to Juan Ramirez. By the time of the hearing, Ramirez had married and become Maria Ponce. The General Counsel's witnesses referred to her by her maiden name while the Respondent's witnesses used her married name. To avoid confusion with Juan Ramirez, I will refer to her by her current married name, Ponce, in this decision.

[5] No party contends that the lead persons, or Ponce in particular, were statutory supervisors or agents.

[6] The General Counsel did not allege that this conversation violated the Act because it occurred more than 6 months before the charge was filed and served.

she did not know when she wanted to take the leave, that she might have to leave in the middle of the night. Ramirez told her to call and let him know when she left and he would put in the paperwork. Ramirez testified further that he did check with human resources after this meeting and they told him it was okay for her to take that extra week. Ramirez' desk calendar which is in evidence contains the following notation on February 9: "Margarita may have to leave on emergency." Ponce, who testified for the Respondent, was not asked any questions about this meeting at which Ramirez says she was present.

Ramirez testified that, on Monday February 22, he retrieved a voicemail message that Arviso left for him on February 20. In her message, Arviso said: "Juan, this is Margarita, I just want to let you know that I have to leave on an emergency. Can you please give me the two weeks I asked for?" Ramirez testified that he then wrote on his desk calendar, under February 20, "Margarita Arvizo—1 week vacation emergency" and, for February 22, "Margarita Arvizo—2 weeks." At the same time, he wrote on the calendar, under March 8, "Margarita Arvizo—return." The calendar in evidence shows that Ramirez made similar notes around the same time for other employees on leave, including one employee, Maribel Perez, who started her leave on the same day as Arviso. On his calendar, under February 22, Ramirez wrote that Perez' leave was "1 week vacation, 2 weeks LOA." Ramirez also called human resources to have the paperwork completed for Arviso's leave on February 22. The "Request for Time Off" which was prepared by human resources on February 23 and signed by Ramirez on February 24, indicates that she had vacation from February 22 through March 3 and unpaid leave for only 2 days, March 4 and 5. It indicates her return date was March 8.

According to Ramirez, after Arviso did not report for work or call in on March 8, 9, and 10, he went to human resources and asked if she had called. When he was told that she had not, he told them to start the paperwork to terminate her. As noted above, her termination letter is dated March 10, the day Ramirez says he went to human resources. The "Payroll Status Change" documenting her termination has a March 10 effective date and is signed by Ramirez on March 11. The reason for her termination written on the form is "voluntary quit, failed to return to work after vacation."

Ramirez testified that Arviso came to work on March 15. According to Ramirez, Ponce directed her to go to human resources and wait for them. When Ramirez came in to work, he was told that Arviso was waiting in the human resources office. Ramirez then met with Arviso in Dodd's office. Dodd was also present. Ramirez testified that another woman, Leticia Ramirez, who works in human resources, was also present. Lupe Garza was on the speaker phone. Garza asked Arviso if she knew she had been gone for over a week, that she was supposed to be back on March 8. According to Ramirez, Arviso said she did know that. Garza then asked her why she didn't come back when she was supposed to. Arviso replied that her mother became very ill the day she was leaving and that she had to stay, then she had car trouble on the way back. Juan Ramirez then asked Arviso why she didn't call and Arviso responded that she didn't have time to call. At that point, Garza told Arviso that since she admitted she was supposed to return on March 8 and didn't return, she had to be terminated.

Ramirez denied any knowledge of Arviso's union activity or sympathies and he specifically denied having any conversation with her about the Union, contradicting Arviso's testimony. Ramirez also denied telling any employees that Arviso was terminated because of the Union. According to Ramirez, no employees even asked him what had happened to Arviso. The only people to ask him about Arviso were a couple of lead persons. Ramirez testified that he merely told them that she was no longer employed by the company.

Ramirez testified that Arviso was terminated pursuant to the policy in the Respondent's employee handbook that "any employee who is absent for three consecutive days without notifying the company . . . will be considered to have voluntarily resigned from employment." Arviso acknowledged being aware of this policy during her testimony. Ramirez testified that the Respondent strictly enforces this policy and uniformly terminates employees who violate it, regardless of their prior work performance or disciplinary record. Both the Respondent and the General Counsel put in evidence records of other employees who have been terminated under this policy. There are no records showing any lesser form of discipline for this offense. What the records do show is that the Respondent is not always so prompt in effectuating such terminations. In fact, around the same time that Arviso was absent, Ramirez waited more than a week before signing the termination paperwork for employees Abraham Almanzo and Daniel Galvan. Ramirez acknowledged that in the case of one employee, Magdalena Ortiz, he initiated paperwork to terminate her based on his mistaken belief that she had overstayed her leave. Ramirez did not know at the time that Ortiz had arranged with another supervisor to delay the start of the leave. When he was informed of this, he canceled Ortiz' termination.

As noted above, Ponce also testified for the Respondent. Her testimony was limited to the telephone conversations she had with Arviso on February 20 and March 13. According to Ponce, on February 20, Arviso told her that her mother was very seriously ill and that she needed a week of vacation and a week of permission.[7] Ponce wrote it in a notebook, which was not produced, and told Juan Ramirez the following Monday. On March 13, Arviso asked Ponce what was going to happen to her. Ponce told Arviso that she would have to speak to the personnel office. Ponce then asked how Arviso's mother was doing. Arviso said, "better." When Ponce asked why Arviso didn't call, Arviso replied that she didn't have time to call or access to a phone.

Dodd and Garza also testified for the Respondent about the meeting in Dodd's office on March 15. According to Dodd, the meeting was conducted in Spanish with "bits and pieces" translated into English. Dodd does not speak Spanish. He testified that Arviso "agreed" that she had not come back when she was supposed to. Because Arviso does not speak English, this must have been translated for Dodd by someone at the meeting. Garza, who is employed by the Respondent's sister company, Paramount Citrus, and works in the human resources office at a facility in Delano, California, was not involved in the decision to terminate Arviso. She testified that Leticia Ramirez, who works in Human resources at the Lost Hills facility, called her and asked her to assist in speaking to an employee who had been terminated. She was called because Silvana Hernandez and Juana Lacy, the human resource managers for Lost Hills, were not available. According to Garza, Arviso asked about a termination letter she had received. Garza told her that she was no longer employed by the company, that the reason was the Respondent's no call/no show policy. Garza testified that Arviso said that she couldn't come back because she was having car trouble and that she couldn't call either. Garza recalled that Arviso admitted violating the policy. Juana Lacy, whom Garza identified as the person who made the decision to terminate Arviso, and the person who signed the March 10 termination letter, was not asked any questions about Arviso's termination.

The General Counsel alleges that Ramirez' statements to Cota and Acevedo after Arviso's termination violated Section 8(a)(1) of the Act. The Respondent argues, on credibility grounds, that this allegation should be dismissed because Ramirez did not make the statements attributed to him by these two witnesses. I have already found Cota and Acevedo to be credible witnesses. As noted above, they are current employees testifying against their employer. Moreover, there is nothing in the record to suggest that they have anything to gain by testifying falsely in this proceeding. Ramirez, as a supervisor and agent of the Respondent, could be expected to testify favorably for the Respondent. In addition, it is his decision to terminate Arviso that is at issue in these proceedings and it is highly unlikely that he would admit making such statements. Finally, I note that there is a reasonable probability that events occurred as described by Cota and Acevedo. It is to be expected that employees would wonder why a relatively long-term employee like Arviso was no longer at work and would question their supervisor about it. If Ramirez had just terminated Arviso because of her involvement in the Union, he may very well have told employees this in order to further chill their interest in the Union. Accordingly, I find that the Respondent, through Ramirez, violated Section 8(a)(1) of the Act in March by telling employees that Arviso was terminated because of the Union. *Aero Metal Forms,* 310 NLRB 397, 400 (1993).

The General Counsel further alleges that the Respondent terminated Arviso in violation of Section 8(a)(1) and (3) of the Act. The Respondent argues that the General Counsel has failed to prove that the Respondent had knowledge of Arviso's union activities or antiunion animus. The Respondent contends further that Arviso was lawfully terminated pursuant to its uniformly applied policy treating an absence of 3 consecutive days without reporting as a voluntary quit. The Board's test for determining motivation in cases arising under Section 8(a)(1) and (3) of the Act was first set forth in *Wright Line, Inc.,* supra. The General Counsel must first prove, by a preponderance of the evidence, that an employee's protected activity was a motivating factor in the employer's conduct. Upon such a showing, the burden shifts to the employer to prove

[7] This appears to be the translation from the Spanish term for a leave of absence.

that it would have taken the same action in the absence of the protected activity. To sustain his burden, the General Counsel must show: (1) that the employee was engaged in protected activity; (2) that the employer was aware of this activity; and (3) that the activity was a "substantial or motivating factor" in the employer's decision. Id. The Board has held that motive is a question of fact and may be demonstrated by circumstantial evidence as well as direct evidence. *Naomi Knitting Plant,* 328 NLRB 1279 (1999), and cases cited therein. With respect to the employer's burden under *Wright Line*, the Board has said that it is not enough to show that the employer had a legitimate reason for imposing discipline. The employer must show that the same action would have been taken even without the protected conduct. *Hicks Oil & Hicksgas,* 293 NLRB 84, 85 (1989).

Arviso's testimony that she signed a union authorization card, held union meetings at her home and collected signed authorization cards from other employees is uncontroverted. The Respondent's knowledge of this activity is established by Ramirez' postdischarge statements to other employees that Arviso was terminated "because of the Union." I also credit Arviso's testimony that, before her termination, she told Ponce that she was holding union meetings at her home and that Ramirez then spoke to her about the Union in February. Although Ponce is not alleged to be a supervisor or agent of the Respondent, she nevertheless acted as a conduit of information between management and the employees in her position as leadperson. Ponce herself testified that employees would request leave from her and she would pass the request on to her supervisor, Ramirez, who would obtain the approval from human resources. Moreover, it is undisputed that Arviso communicated with Ponce when she left for Mexico because of her position as leadperson, with the understanding that Ponce would relay this information to Ramirez. Because of her unique position, it is reasonable to infer that Ponce also passed along the information she received from Arviso regarding the union meetings. This inference is supported by the fact that, after Arviso's conversation with Ponce, Ramirez interrogated Arviso about the Union and warned her "there would be consequences" if she didn't get out of the Union. This latter conversation also establishes the Respondent's animus toward Arviso's union activities. While not alleged as an independent violation of the Act because of Section 10(b), Ramirez' interrogation and threat may nevertheless be relied upon to establish animus. See *Cla-Val Co.,* 312 NLRB 1050 fn. 3 (1993); *Best Products Co. ,* 236 NLRB 1024, 1025 (1978). In addition, Ramirez' postdischarge statements to other employees, found unlawful above, provide direct evidence of the Respondent's antiunion motivation. Finally, I note that Arviso's discharge occurred around the time that the Respondent began holding meetings with the employees to communicate its opposition to the Union, including the meeting described above at which Szeflin and Lacy advised the employees that they could revoke their signed union authorization cards.

I find, based on the above, that the General Counsel has met his initial burden of showing that Arviso's union activities were a substantial or motivating factor in the Respondent's decision to terminate her. The burden thus shifts to the Respondent to prove that it would have terminated Arviso even absent her protected activity. The Respondent's contention that Arviso was terminated pursuant to Respondent's uniform application of its "three day no call/no show policy" is based on Ramirez' testimony that Arviso only asked for 2 week's leave to visit her sick mother. Arviso claimed that she requested 3 weeks of leave. If Arviso is credited, then her return to work on March 15 did not violate the Respondent's policy and the Respondent's defense fails. Thus, the ultimate resolution of this case turns on a credibility resolution between Ramirez and Arviso.

Having considered all of the evidence, and the demeanor of the witnesses, I find that Arviso is the more credible witness. I note initially that, although Ramirez claimed that Ponce was present when Arviso first asked for leave on February 9, the Respondent made no attempt to have Ponce corroborate Ramirez' testimony that Arviso only asked for 2 weeks. Moreover, Ramirez testified that Arviso asked for all of her vacation and a week of leave. If this were the case, Arviso would have requested more than 2 weeks of leave even under Ramirez' version of the meeting. The Respondent's records show that Arviso had 8 vacation days available when she started her leave. If she indeed requested "all of her vacation plus one week," she would not have been due back before March 11. Under that scenario, Arviso's return on March 15 would not have violated the Respondent's policy. Ramirez attempted to avoid this finding by surmising that Arviso thought she had one week's vacation when she made her request. He did not testify that she actually said this at the time, leaving one to conclude that Ramirez is a mind reader. In contrast, Arviso's testimony on direct and cross was quite consistent, i.e., that she asked for 3 weeks in total. In reaching my credibility resolution on this issue, I also find it unlikely that an employee like Arviso, who had been a generally good employee for a number of years, would fail to return to work when scheduled without notifying the company, in violation of a clear company policy she acknowledged being aware of. I find it more likely that she asked for and received permission to be absent for 3 weeks and returned on March 15 as scheduled. Respondent's haste in effectuating Arviso's termination, together with Ramirez' postdischarge statements to other employees, further supports my conclusion that the Respondent wanted to get rid of a known union adherent before she could return to work and continue her protected activities.

In reaching my decision, I have considered the Respondent's arguments that the testimony of Arviso is not credible. The fact that she filed a discrimination charge with the State DFEH soon after her termination, rather than an unfair labor practice charge with the Board, does not mean she is lying in these proceedings. Arviso is an unsophisticated employee who speaks and understands very little English. She may not have understood the difference between an unfair labor practice and a discrimination complaint. Although Arviso may have suspected that Respondent had a different motive at the time of her termination, she could not have known the Respondent's true motive in discharging her. The statements made by Ramirez indicating an unlawful motive under the Act were made to other employees, not Arviso. The fact that her initial complaint to the DFEH makes no mention of the union and makes no claim of antiunion motivation is not surprising. The DFEH has no jurisdiction to investigate unfair labor practice charges. Because it was someone at that agency who prepared the complaint in English, it was only natural that the complaint would be written in language that fell within the scope of that agency's duty to investigate. Any complaint by Arviso that her termination was motivated by antiunion considerations would have been irrelevant to the DFEH agent preparing Arviso's complaint. I have also considered Arviso's testimony that she had the note from her mother's doctor with her when she met with Ramirez and Dodd on March 15, something that would have been impossible because the note postdates the meeting. While this discrepancy in her testimony is troubling, I do not believe she fabricated her testimony in order to prove a violation. At worst, it appears that Arviso was confused regarding the timing and sequence of events surrounding her termination, which would not be surprising consider the passage of time and the emotional impact of such an event.

Accordingly, I conclude that the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged in the complaint, by discharging Arviso on March 10 because of her union activities.

C. The Layoff and Failure to Recall Ortiz

Leticia Ortiz was employed by the Respondent from October 22, 1994, until her layoff on April 19, 1999. At the time of her layoff, she was employed in the pistachio department on the second shift as a lead helper in the handsorting section. She had held this position for 3 years and worked previously as a handsorter. Ortiz testified that despite the seasonal nature of the Respondent's business, with a layoff usually occurring in April or May each year, she had never been laid off before 1999. According to Ortiz, when work slowed, she was usually transferred to the day shift to work as a sorter or in quality control. Ortiz testified further that those employees who were laid off each April would usually be recalled in September.

Ortiz first learned about the Union from a coworker in March. She was invited to a meeting on March 7 and signed a union authorization card at that meeting. Ortiz testified that she attended union meetings about every 2 weeks before she was laid off. She also distributed union authorization cards to other employees. As noted above, Ortiz attended a meeting on second shift on or about April 5 at which Szeflin spoke and Lacy translated. The meeting was about union cards. Immediately after this meeting, Ortiz was involved in a small-group discussion about the Union which took place in the conference room adjacent to the dining room. Supervisor Enriquez was present for this discussion. During this discussion, several employees, including Maria Corral, made negative comments about the Union. Ortiz apparently said nothing. Later that evening, Enriquez approached her while she was working and suggested that she ask employees what they thought about the Union. Ortiz agreed to do this. No one else

was present for the conversation.[8] Enriquez, an admitted supervisor and agent of the Respondent, did not testify in this proceeding.

There is no dispute that, on April 15, Ortiz distributed about eleven union authorization cards to employees at work. Ortiz did this in the dining room while the employees were supposed to be working. On April 19, her next scheduled workday, Ortiz was suspended. At the time of her suspension, Silvana Hernandez, the Respondent's Human resources Manager, told Ortiz that employees had reported that Ortiz was handing out union cards at work.[9] On April 22, Ortiz called the Respondent to find out if she could come back to work. She asked to speak to Hernandez and was told that Hernandez was not there and that no one was there to assist her. The next day, April 23, Ortiz went to the Respondent's facility and spoke with Lacy about getting her job back. Lacy told Ortiz that other employees had reported that Ortiz was distributing union cards while they were working and that they were afraid that they might get fired. Ortiz was not reinstated at that time, pending the Respondent's investigation of these claims. Sometime later, on a date that Ortiz did not recall, Hernandez called her and told her to come to the office on April 29, at which time a decision would be made about her job.

On April 29, Ortiz met in an office at the facility with Dodd and Hernandez. Hernandez gave her a memorandum signed by Dodd, dated April 29, advising her that the Respondent's investigation confirmed that she had been "pulling employees away from their workstations" on April 15. In his memo, Dodd stated that Ortiz did not have the authority as a lead helper to do this. The memo further advised Ortiz that she would be paid for the time she was on suspension while the investigation was being conducted, but that she was now being laid off because her shift had been laid off the previous week due to the "reduction in productivity." The memo concluded as follows:

> As we begin hiring for the harvest in a few months, your name will be on the list of people to be recalled.

After Hernandez gave her this memo, Ortiz asked if she was going to get her job back. Hernandez told her that there was not enough work at that time and that there would not be any work until the harvest began. Hernandez told Ortiz that she would be on a recall list until then. Ortiz testified that she has not been recalled to work since April 29. On cross-examination, Ortiz acknowledged that she has not contacted the Respondent since her layoff about a job.

Dodd, the Respondent's production manager for the pistachio plant, testified regarding Ortiz' layoff. According to Dodd, the second shift in the handsorting area had 24 sorters, 3 quality control employees, 2 forklift drivers, and a lead person during the season that started in September 1998. Enriquez was the supervisor. Dodd testified that Ortiz occupied the position of hand-sort/lead helper. Her duties included assisting the leadperson and supervisor in making sure that the tables were running and that employees got their breaks. She was the only lead helper at the Respondent's Lost Hills facility.

Dodd acknowledged suspending Ortiz for pulling people off the line to meet with them individually in the conference room. On cross-examination, he acknowledged further that employees had reported that Ortiz was in fact asking the employees to sign union authorization cards at these individual meetings. Dodd denied that Ortiz' suspension was for distributing union cards. According to Dodd, she was suspended for interfering with production. Dodd testified that, while Ortiz was suspended pending the Respondent's investigation into this matter, the Respondent ran out of production and laid off the entire crew on second shift. A position statement submitted by the Respondent during the investigation reveals that the quality control lead person, Maria Corral, and the three quality control employees were not laid off, but were transferred to the day shift. Another second-shift employee, forklift driver Roberto Rodriguez, was transferred to another crew. Although Dodd testified that there was no need for the laid-off second-shift sorters to return to work until the 1999 harvest started in mid-October, the position letter indicates that several of the employees on Ortiz' crew were recalled before then, some as early as May 17, a month after the layoff.

Dodd testified further that, during the off-season, the Respondent invested in new technology on the pistachio line which reduced its need for handsorters in half. David Blanchat, the Respondent's director of pistachio operations, testified in more detail regarding these changes. According to Blanchat, the Respondent began testing several different sorters in January and concluded by April that replacement of its old sorters with a new sorter that used a camera-based technology could improve efficiency and result in fewer defective nuts being passed on to handsorting. The Respondent purchased and installed these new sorters in August and September at a cost of about $1 million. According to Blanchat, with these new sorters in place for the 1999–2000 season, the Respondent needed only half the number of handsorters on each shift. According to Dodd, the Respondent also eliminated the lead helper position occupied by Ortiz during the off-season because, with the new sorting machines, there was no need for such a position.

The Respondent had the following layoff and recall policy in effect in April, when Ortiz was laid off, as reflected in its employee handbook:

> LAYOFF AND RECALL PROCEDURES
>
> Because of the seasonal nature of our business, there are times when layoffs are necessary. If a layoff should become necessary the following orderly procedure will be followed:
>
> 1. Layoffs
>
> A. Persons to be laid off will be selected according to their performance on the job, attendance, safety record, and length of time they have worked in the department being reduced. However, employees who possess special job skills within a department may be kept in the department regardless of the amount of time in the department.
>
> B. It is the responsibility of laid-off employees to provide the Company with an address at the time of the layoff where the employee can be reached should a recall become necessary prior to the expected date given at the time of layoff.
>
> C. A regular full-time employee not recalled within six months will lose seniority and be rehired as a seasonal employee. If rehired within six months, adjustment will be made to the seniority date.
>
> 2. Recalls
>
> A. Under normal conditions the Company will expect employees on inactive status (laid-off employees) to contact the office shortly before the expected recall date to find out the exact date to report back to work.
>
> B. Recalls to work will be on a department-by-department basis. The Company will recall employees who possess the required skills for the job(s) to be performed and according to their prior work performance, attendance, etc.
>
> C. In the case of two or more employees meeting with the above criteria, seniority will be the deciding factor.
>
> D. In situations where work becomes available prior to the expected recall date given to the employee at the time of layoff, employees possessing the necessary job skills will be contacted at their last known address for recall purposes. The Company will terminate its employment relationship with an employee who refuses a recall or who does not show up to work when properly notified within three days after the start of work.

Dodd conceded on cross-examination that Ortiz had no problems with respect to her job performance or attendance. In August, the Respondent changed its recall policy to limit an employee's recall rights to their current job classification at the time of layoff.

[8] The General Counsel did not allege that this conversation was unlawful, even though it allegedly occurred within 6 months of the filing and service of the charge regarding Ortiz' discharge.

[9] The General Counsel dismissed the Union's charge alleging that this suspension was unlawful.

The Respondent's current director of human resources, Angela O'Blenis, testified regarding the application of these policies with a focus on what happened to the employees who worked with Ortiz on second shift.[10] When a layoff is necessary, the manager or supervisor for the affected department will notify human resources which then prepares a list based on the layoff criteria specified in the employee handbook, including seniority. The manager or supervisor will then select employees for layoff from that list, subject to approval from the human resources department. O'Blenis testified that human resources has the final word on whether an employee will be laid off. The Respondent follows a similar process for recalls. When the department supervisor or manager notifies human resources that a recall is necessary, human resources prepares a recall list from information in the computer regarding employees' job classifications, seniority dates, etc. O'Blenis testified that a supervisor or manager usually will not specify any individual for recall unless they possess a particular skill, as in the case of machine operators.

O'Blenis testified further that employees are given an anticipated recall date at the time of their layoff. Employees are expected to call the Respondent a week or two before that date to let the Respondent know if they are available to come back to work. Employees who only work during the harvest, when the crop is delivered and stored in the silos, receive a letter at their last known address telling them when to report. In addition to this seasonal recall procedure, the Respondent will also from time to time have openings to fill throughout the facility. O'Blenis testified that, when a department head notifies human resources of an opening, the Respondent will first exhaust the recall list of employees who previously held that position. If unable to fill the position in this manner, the Respondent will then query its computer database for employees in other departments with experience in that position. According to O'Blenis, the Respondent will generally offer open positions to employees who held similar positions at the same wage rate. O'Blenis testified that, in her experience, people generally will not accept recall to a lower wage job.

The Respondent put in evidence a document prepared by O'Blenis from data in the Respondent's computer system showing what happened to the employees who worked with Ortiz on second shift at the time of the layoff in April. The Respondent's summary revealed that five employees were transferred to other positions and were not laid off. Lead Person Maria Corral was transferred to a similar position on first shift in the in-shell handsorting department. Maria Coria, a quality control employee on Ortiz' shift, was transferred to the same position on first shift in the same department with Corral. Another quality control employee, Maria Lopez de Sanchez, was transferred to a packing position in pistachio packaging, also on first shift. Maria Maricela Villasana, who was a clerk on Ortiz' crew, was transferred to the same position on first shift, also in the in-shell handsorting area. Finally, forklift driver Roberto Rodriguez was transferred to another forklift driver position in pistachio preprocessing on the second shift. All but Rodriguez had earlier seniority dates.

The Respondent's summary also shows that five employees, including Ortiz, had not been recalled to any position by the date of the hearing. All had less seniority than Ortiz. Eleven employees who had been handsorters on Ortiz' crew were recalled before the Respondent changed its recall policy in August. Six of these employees were recalled within a month of the layoff. All of these 11 employees had less seniority than Ortiz. The Respondent's summary shows that they were recalled to different departments or different job classifications, such as packing or quality control. O'Blenis explained that these were individuals who were contacted about filling openings that could not be filled from the recall list for those positions. According to O'Blenis, the Respondent would not have called Ortiz for one of these positions because her wage rate, $6.75, was substantially higher than the wage rate for these classifications, which were in the $6/hour range. The Respondent's summary shows that five additional employees from Ortiz crew were recalled for the 1999–2000 season, beginning in September. O'Blenis explained that Ortiz was not recalled, even though she had greater seniority, because her lead helper position had been eliminated in the off-season. Under the Respondent's revised recall policy for the new season, Ortiz recall rights were limited to this nonexistent position.

[10] O'Blenis assumed this position in November, after the events at issue here. She had no personal knowledge regarding Ortiz' layoff and the recall of employees who returned to work before that date. Before November, O'Blenis was the fruit roll-up plant manager.

The Union alleged, in Case 31–CA–24097, that the Respondent violated the Act by suspending Ortiz as well as by laying off and failing to recall her. The Respondent placed in evidence, and requested administrative notice of, a partial dismissal letter from the Board's Regional Director, dated December 29. In that letter, the Regional Director notified the parties that he found insufficient evidence to warrant issuing a complaint alleging that the suspension violated the Act. The letter indicates that the Regional Director found that Ortiz had been lawfully suspended for violating the Respondent's no-solicitation policy, based in part on "the absence of independent 8(a)(1) conduct directed at Ortiz, or evidence of animus directed by the Employer toward Ortiz." The Board will take administrative notice of official records of the Board, including dismissal letters such as this. *Bryant & Stratton Business Institute,* 321 NLRB 1007 fn. 2 (1996). However, the Board has also held that the General Counsel's exercise of his prosecutorial discretion not to issue a complaint is not binding on the Board in its disposition of a separate related case. Id. at 1007, fn. 5.

The General Counsel alleges that the Respondent terminated Ortiz on April 29 and, since that date, has failed and refused to recall her in violation of Section 8(a)(1) and (3) of the Act. The Respondent contends that Ortiz was laid off as part of a seasonal layoff when the entire handsorting crew on her shift was eliminated. The Respondent argues further that Ortiz was not recalled because her position was eliminated while she was on layoff as a result of production efficiencies achieved through capital improvements on the handsorting line. Finally, the Respondent contends that it has not recalled Ortiz to any other position because it had a need for fewer handsorters in the 1999–2000 season and because Ortiz has not kept in contact with the Respondent about her interest in any other jobs.

The Board's *Wright Line* test for determining motivation is applicable to this allegation. There is no dispute that the Respondent was aware of Ortiz' union activities at the time of the layoff. With respect to animus, the Respondent relies on the Regional Director's partial dismissal letter as establishing the absence of this key element in the General Counsel's case. As noted above, however, the Regional Director's finding of no animus in dismissing the suspension allegation is not binding on the Board in this case alleging that Ortiz' termination was unlawful. While the record before me also contains no direct evidence of animus directed specifically toward Ortiz, there is evidence of the Respondent's general animus toward the Union.[11] I have already found above that the Respondent discriminatorily terminated Arviso and unlawfully told other employees that it had terminated Arviso because of the Union. In addition to these independent violations of the Act, the record reveals that the Respondent communicated its opposition to the unionization of its employees at employee meetings and in written materials distributed during the organizing campaign. The Board has historically considered such statements as evidence of animus. See *Meritor Automotive, Inc.,* 328 NLRB 813 (1999); *Lampi LLC,* 327 NLRB 222 (1998). Moreover, as the General Counsel correctly points out, it is well established that animus may also be inferred from circumstantial evidence, such as timing. See *Olathe Health Care Center,* 314 NLRB 54 (1994); *Abbey's Transportation Services,* 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988).

The circumstances here, however, do not point overwhelmingly toward a finding of unlawful motivation. Although Ortiz was laid off while serving a suspension related to her union activity, that suspension is not alleged to be unlawful. The fact that Ortiz was laid off in the midst of the Respondent's antiunion campaign is not decisive because there is no dispute that seasonal layoffs historically occurred at this time of year. The General Counsel did not challenge the Respondent's evidence that there was a need to lay off the second-shift handsorting crew because of a decline in product. There is no evidence in the record that any of the other employees who worked with Ortiz were retained in handsorting on the second shift. Thus, the best circumstantial evidence suggesting a discriminatory motive is the fact that Ortiz had never been laid off before at the end of the season and the fact that other employees were transferred and not laid off in April 1999. I find that these circumstances are not sufficient to prove, by a

[11] Supervisor Enriquez' request that Ortiz interrogate other employees regarding their union sympathies, not alleged as an unfair labor practice, does not reflect any specific animus toward Ortiz. While it may be evidence of the Respondent's general antiunion animus, I find it unnecessary to rely on this incident because of the other evidence of general animus discussed infra.

preponderance of the evidence, that it was Ortiz' union activities, rather than the business needs of the Respondent, that led to her layoff. I note that all of the employees who were transferred in 1999 had more seniority that Ortiz and held different positions. Accordingly, I find that the Respondent did not lay off Ortiz on April 29 in violation of the Act.

There remains for consideration the allegation that Ortiz has not been recalled since April 29 because of her known union activities. The circumstances here are more suspect. The Respondent's own records show that employees with far less seniority than Ortiz were recalled to other positions, shifts and departments as soon as a month after their layoff. Ortiz was at least as qualified as these other employees to perform the unskilled packing and sorting jobs they filled. In addition, most of these recalls occurred before the Respondent changed its recall policy to limit employees' recall rights to their prelayoff job classification. The effect of that change in August was to eliminate any recall rights Ortiz may have had because her pre-layoff classification has been abolished. While it is true that other employees who were laid off with Ortiz remain unreinstated to this day, all had less seniority than Ortiz. I find that these circumstances, together with the evidence of the Respondent's general antiunion animus, support an inference that the Respondent was motivated by antiunion considerations in failing to recall Ortiz to any of the open positions it filled after her layoff. The burden thus shifts to the Respondent to show that Ortiz would not have been recalled to any open position even in the absence of protected activity.

The Respondent, through O'Blenis' testimony, contends that Ortiz would not have been recalled to any of the positions filled by her junior colleagues even in the absence of union activity because her rate of pay was too high. There is nothing in the Respondent's written recall policy, as it existed prior to August, to support this contention. On the contrary, the written policy provides merely that "employees possessing the necessary job skills will be contacted at their last known address" in situations where work becomes available prior to the expected recall date. While it may be true, as O'Blenis testified, that "people generally don't accept a lower wage rate," Ortiz was never given that opportunity. Because an employee's prior wage rate is not one of the written criteria for recall in the Respondent's handbook, I find that the Respondent has not met its burden of proving that Ortiz would not have been recalled to any job even in the absence of union activity. I find instead that the Respondent deliberately avoided recalling Ortiz until it could revise its policy to essentially eliminate her recall rights because she had been active before her layoff in soliciting other employees to sign union authorization cards. Accordingly, I conclude that the Respondent's failure to recall Ortiz to any open position since her April 29, 1999 layoff violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. By telling employees that it had terminated another employee because of the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6), and (7) of the Act.

2. By terminating Margarita Arviso on March 15, 1999, and by failing to recall Leticia Ortiz since April 29, 1999, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. The Respondent has not violated the Act in any other manner alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily discharged Margarita Arviso, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In order to remedy its failure to recall Leticia Ortiz, I shall recommend that the Respondent be ordered to offer her reinstatement and to make her whole for any loss of earnings and other benefits since May 18, 1999, the date that the Respondent recalled the first group of employees who were laid off with Ortiz to other jobs. Ortiz' backpay shall be computed in the manner described above, with interest. Because the primary language for many of the Respondent's employees is Spanish, I shall recommend that notices be posted in both English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Paramount Farms, Inc., Lost Hills, California, its officers, agents, successors, and assigns, shall

Cease and desist from

(a) Telling employees that other employees had been terminated because of the Union.

(b) Discharging, failing to recall from layoff, or otherwise discriminating against any employee for supporting Packing & Food Processing Employees Union, Local Union 550, Laborers' International Union of North America or any other union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Margarita Arviso and Leticia Ortiz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Arviso and Ortiz whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Arviso and the unlawful failure to recall Ortiz, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge and failure to recall will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Lost Hills, California copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 15, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell our employees that we have terminated other employees because of the Union.

WE WILL NOT discharge, fail to recall from layoff, or otherwise discriminate against any of you for supporting Packing & Food Processing Employees Union, Local Union 550, Laborers' International Union of North America or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Margarita Arviso and Leticia Ortiz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Margarita Arviso and Leticia Ortiz whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Arviso and the unlawful failure to recall Ortiz, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharge and failure to recall will not be used against them in any way.

PARAMOUNT FARMS, INC.